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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 513

WILLIAM A. LYON, SUPERINTENDENT OF BANKS OF THE STATE OF NEW YORK, AS LIQUIDATOR OF THE BUSINESS AND PROPERTY OF YOKOHAMA SPECIE BANK, LTD., IN THE STATE OF NEW YORK, PETITIONER

v.

BANQUE MELLIE IRAN

No. 528

BANQUE MELLIE IRAN, PETITIONER

v.

WILLIAM A. LYON, SUPERINTENDENT OF BANKS OF THE STATE OF NEW YORK, AS LIQUIDATOR OF THE BUSINESS AND PROPERTY OF THE YOKOHAMA SPECIE BANK, LTD., IN THE STATE OF NEW YORK

ON WRITS OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

STATEMENT

This case is here on writs of certiorari obtained respectively by the Superintendent of Banks of the

State of New York (hereinafter referred to as the "Superintendent") and Banque Mellie Iran (hereinafter referred to as the "plaintiff"). The underlying facts are stated in the Superintendent's brief. At the time the petitions were granted this case presented essentially the same issues as were presented by the *Singer* case (Nos. 512 and 527). The position of the United States on those issues is stated in our Brief *amicus curiae* in the *Singer* case.[1]

In the memorandum of the United States *amicus curiae* in support of the petitions in Nos. 512 and 513 we stated that consideration was being given to a pending license application filed by the plaintiff in this case. Subsequent to the grant of the petitions a letter was addressed by the Acting Director, Office of Alien Property, to the plaintiff dated March 16, 1950.[2] In that letter the Acting Director said: "I hereby license, authorize and validate the transactions which form the basis of the claim of Banque Mellie Iran in the [present action]." Authority was accordingly given to the Superintendent to pay and to counsel for the plaintiff to receive the amount of the judgment below. In view of this license the plaintiff has now moved to dismiss the writs of certiorari as moot.[3]

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[1] That brief has been served on counsel for plaintiff herein.

[2] A copy of this letter is set out in the plaintiff's Motion to Dismiss.

[3] Although the Motion is formally addressed only to the writ in No. 513, we assume that it was intended to apply also

As the license makes plain, there is no longer any federal impediment to the payment of the amount claimed by plaintiff. Accordingly, although we believe that the judgment of the Court of Appeals rested on an erroneous basis, the United States would not object to the dismissal of the writs of certiorari as moot and the consequent enforcement of the judgment below. We understand, however, that the Superintendent believes that there may still be obstacles to the payment of the plaintiff's claim. As we understand it, his argument will run as follows. In the view of the Superintendent (and of the United States)[4] the plaintiff's claim rested on a prohibited transaction and the plaintiff accordingly had no right of any kind against the Agency or against its assets in the hands of the Superintendent until such time as a license might be issued. Hence at the date when the Superintendent took possession of the assets of the Agency plaintiff had no standing as a preferred creditor. Under New York law, the Superintendent asserts, only those creditors whose claims have accrued at that date may be recognized as preferred creditors, and no events occurring thereafter may be considered. Since these are questions of New York law on which the New York courts have not passed, the appropriate procedure (should this Court agree

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to the writ in No. 528, since the petition in No. 528 requested the grant of the writ only in the event that a writ was granted No. 513.

[4] See our Brief in *Singer*, pp. 16-26.

with the basic contention that no rights could accrue in plaintiff's favor in the absence of a license) would be to remand the case to the New York courts for further consideration by them.

We do not believe that such a remand is necessary. Rather we suggest that in the event that this Court should agree with the Superintendent that the writs of certiorari should not be dismissed, it would be appropriate for this Court to make a final disposition of the case by affirming the judgment below. Such an affirmance would, if we are correct in the views expressed in our Brief in the *Singer* case, rest on other grounds than those adopted by the court below. In the remaining portion of this Brief, we shall set out the grounds on which we believe such an affirmance would be proper.

ARGUMENT

I. *The Custodian's license is retroactive in effect and validates ab initio the transaction underlying plaintiff's claim.*

For the reason stated in our Brief in the *Singer* case, we believe that absent a license plaintiff had no rights against the Agency or against its assets in the hands of the Superintendent. That defect in plaintiff's position was, however, completely cured by the grant of a license.

That license was intended as a validation of the underlying transaction *ab initio*. In his letter to counsel for plaintiff dated March 16, 1950, the

Acting Director, Office of Alien Property, Department of Justice, stated:

> I hereby license, authorize and validate the transactions which form the basis of the claim of Banque Mellie Iran in the above-entitled action * * *.

He also noted that the Office of Alien Property had previously taken the position "that a license for payment will not be granted unless this Office is prepared to license the underlying transactions." Indeed, in the view of the law which has been consistently asserted by the United States throughout this proceeding, such a retroactive validation of the underlying transaction was the only kind of license which would be of any benefit to the plaintiff, for in the absence of a validation of the underlying transaction the plaintiff would have no claim entitling it to payment.

The phraseology of the Acting Director's letter is drawn directly from paragraph 3 of Treasury General Ruling No. 12, 7 F. R. 2991, which expressly provided for the validation by subsequent license of a prior unlicensed transaction and declares the effect of such a validation.[5] That paragraph states:

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[5] See also General Ruling No. 4, paragraph 18, as amended, 8 F.R. 12285. "No license or other authorization issued by or under the direction of the Secretary of the Treasury pursuant to the order or sections 3(a) or 5(b) of the Trading With the Enemy Act, as amended, shall be deemed to authorize or validate any transaction effected prior to the issuance thereof,

> Unless otherwise provided, an appropriate license or other authorization issued by the Secretary of the Treasury before, during or after a transfer shall validate such transfer or render it enforceable to the same extent as it would be valid or enforceable but for the provisions of section 5(b) of the Trading With the Enemy Act, as amended, and Order [sic], regulations, instructions and rulings issued thereunder.

This statement that a license issued "after the transfer" shall validate the transfer and render it enforceable "to the same extent as it would be valid or enforceable but for the provisions" of Section 5(b) of the Act and the freezing regulations issued thereunder is necessarily a statement that upon the issuance of a subsequent license the transaction thereby validated shall be considered as though it had never been prohibited by the Act or Order.[6]

This provision reflects the consistent administrative practice of both the Treasury and the Office of Alien Property Custodian.[7] In general, the

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unless such license or other authorization specifically so provides." This provision also is a clear recognition that an unlicensed transaction may be validated by subsequent license.

[6] It is unnecessary to consider here to what extent this principle would apply in a case in which there are intervening third party rights. As we shall point out, there are no such rights here.

[7] While the Treasury Rulings are not in terms applicable to licensing action by the Office of Alien Property, the Custodian in the exercise of his licensing jurisdiction over transactions involving vested property has been guided by the principles and practices established by the Treasury Department. By Executive Order 9989, August 20, 1948, 13 F. R. 4891, jurisdiction over certain unvested property was transferred to the

Treasury, in order to avoid the necessity of considering *in vacuo* whether it would license transactions that were merely hypothetical or contemplated, insisted that parties seeking a license execute in advance all instruments necessary, as a matter of private law, to effectuate the transaction.[8] The Office of Alien Property has likewise had occasion to issue retroactive licenses. The problem has arisen particularly in connection with the allowance by the Director of claims filed under Sections 32 and 34 of the Act. Section 32 provides that the President may upon certain conditions return vested property upon a determination that the claimant "was the owner of such property or interest immediately prior to its vesting in or transfer to the Alien Property Custodian." In *Matter of Fuel Refining Corporation*, Title Claim No. 904-A-199, decided August 10, 1948, the claimant asserted that it was the owner of certain vested patents by virtue of an assignment executed by

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Custodian. As to such property paragraph 2 of the Executive Order provides that "all orders, regulations, rulings, instructions, or licenses issued by the Secretary of the Treasury under the authority of Executive Order No. 8389, as amended, and Executive Order No. 9095, as amended, and in force on September 30, 1948, shall continue in full force and effect except as amended, modified, or revoked by the Attorney General."

[8] This practice is reflected in the language of par. 3, General Ruling No. 12, *supra*. See also Reeves, *The Control of Foreign Funds by the United States Treasury*, 11 Law and Contemporary Problems 17, 45 (1945); Reeves, *Policies of the United States Treasury as Applied to Blocked Funds in Litigation*, 113 N.Y.L.J. 2180 (1945); Berger and Bittker, *Freezing Controls: The Effects of an Unlicensed Transaction*, 47 Col. L. R. 398, 407 (1947).

a Dutch corporation after the date when assets of Dutch nationals were frozen. That assignment was not initially licensed and the question presented was whether a license could be granted which would relate back so as to permit a determination that the claimant was the owner immediately prior to vesting. The Deputy Director, Office of Alien Property, held that such a license could be granted. He pointed out that "it has been the consistent administrative practice of the Treasury Department in operating Foreign Funds Control to license transactions retroactively" and that "although the normal practice in the Office of Alien Property has been to grant licenses upon request prior to consummation of the transaction, in exceptional cases authorizations or licenses have been issued to validate past transaction."[9]

The practice of retroactive licensing in appropriate cases thus announced in the *Fuel Refining* case has been consistently followed by the Office of Alien Property in proceedings under Section 32. A like practice has been followed in debt claim proceedings under Section 34 of the Act, which prescribes that a debt claim may be allowed only if

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[9] Opinions of the Director or Deputy Director in claims proceedings under Section 32 are not published. A copy of each such opinion is, however, filed with the Division of the Federal Register and copies are made available to any person requesting them. For the convenience of the Court, the opinion in the *Fuel Refining* case is set out in full in an appendix hereto.

it was "due and owing at the time of * * * vesting or transfer" (in or to the Custodian).[10]

This consistent administrative practice of granting retroactive licenses in appropriate cases, validating *ab initio* the transfer so licensed, is plainly an appropriate exercise of the powers conferred by the Trading With the Enemy Act. Section 5(b)(1) of that Act confers broad general powers to "investigate, regulate, direct and compel, nullify, void, prevent or prohibit" transactions involving foreign property. The committees of Congress which approved the First War Powers Act of December 18, 1941, emphasized the intent of Congress, in amending Section 5(b), to vest "flexible powers in the President, operating through such agency or agencies as he might choose, to deal with the problems that surround alien property or its ownership or control in the manner deemed most effective in each particular case." H. Rep. No. 1507, 77th Cong., 1st Sess., p. 3; see, also, S. Rep. No. 911, 77th Cong., 1st Sess., p. 2. See *Clark* v. *Uebersee Finanz-Korp., A. G.*, 332 U. S. 480, 485. In selecting appropriate licensing procedures to deal with trans-

[10] Section 501.50(d) of the Regulations of the Office of Alien Property, 8 C. F. R. (1949 ed.) 501.50(d), expressly provided that in any case in which a license is found necessary, the filing of a claim shall constitute an application for such license. It is the consistent practice of the Office of Alien Property, in cases of summary allowance of title or debt claims in which a licensing question is or may be presented, to provide in the order of allowance that to the extent that a license is necessary it is granted. It is estimated that such a licensing provision has been included in over 50 orders allowing debt or title claims.

actions involving foreign property "in the manner deemed most effective in each particular case" it was plainly competent for the President, or the Agency designated by him, to conclude that in appropriate cases in which decision on licensing issues had for some reason been postponed or delayed, or in which the parties had inadvertently omitted to apply for licenses, it was proper to minimize the hardships imposed by the freezing program by the grant of a retroactive license validating the transactions.

Those considerations are applicable here. It was obviously impracticable, if not impossible, for the authorities administering the freezing program in the months immediately prior and subsequent to the entry of the United States into the war, faced with a welter of novel, complex and pressing problems, to attempt to arrive instantly at a definitive solution of all of them.[11] Moreover, it may have been felt, in cases involving the liquidation of enemy banks, that there were advantages in postponing final decision of licensing questions in view of the possibility that investigation by the Superintendent or actions in the state courts would resolve various questions of fact and state law on which the decision might in part depend. To deny the federal authorities the power to validate a trans-

[11] 330.747 applications for specific license under Executive Order No. 8389 were considered in the fiscal year 1941-42. Annual Report of the Secretary of the Treasury (1942), pp. 159-160.

action *ab initio* by retroactive license would have had the effect of requiring immediate decision of all licensing questions and of destroying any possibility of postponement or of later reconsideration. Such a denial would go far to destroy the flexibility at which Congress aimed.

II. *Giving the license retroactive effect according to its terms will in no way conflict with any applicable policy of the State of New York.*

In the preceding point we have shown that, as a matter of federal law, the Custodian's license had the effect of validating the transaction *ab initio*. The Superintendent suggests, however, that such a result conflicts with applicable policies of the State of New York. He argues that if the plaintiff's claim was not an accrued one on December 8, 1941 it could not, as a matter of New York law, acquire the status of an accrued claim by anything occurring thereafter.

We believe that the effect to be given to a federal license issued in pursuance of the freezing program, like the scope and interpretation of the prohibitions imposed in connection with that program, is a matter to be determined by federal, not state, law. See *Propper* v. *Clark*, 337 U. S. 472, 484-5. In general the courts have held that the administration of the Trading With the Enemy Act is national in scope and is not to be circumscribed by limitations imposed by local law. *Great Northern Railway Co.* v. *Sutherland*, 273 U. S. 182, 193-4;

Silesian American Corp. v. *Clark*, 332 U. S. 469; *Matter of Rosenberg*, 269 N. Y. 247, certiorari denied *sub nom. Rosenberg* v. *United States*, 298 U. S. 669; *Koppelmann* v. *Koppelmann*, 91 N. J. Eq. 67, 108 A. 432, certiorari denied *sub nom. Koppelmann* v. *Palmer*, 252 U. S. 581; *Matter of Bendit*, 214 App. Div. 446.[12]

It is unnecessary, however, to consider whether there would be any reason in the present case for making an exception to these principles. For in the circumstances of the present case we think it is highly unrealistic to suggest that there is any conflict between New York law and policy and the effectuation of the Custodian's license. The New York Court of Appeals has held that the plaintiff's claim should be paid if licensed by the federal government. That holding was made in the face of the fact that it was quite possible that no license would ever be forthcoming and that plaintiff could never be paid. While that holding rested in part on an erroneous belief that legal rights could accrue on the basis of an unlicensed transaction, we find it difficult to believe that the New York courts would

[12] Like principles have been applied under other federal statutes (see, *e.g.*, *Wissner* v. *Wissner*, 338 U.S. 655; *Deitrick* v. *Greaney*, 309 U.S. 190, 201), and generally to instruments issued by federal authorities (e.g. *Clearfield Trust Co.* v. *United States*, 318 U.S. 363; *United States* v. *Allegheny County*, 322 U.S. 174, 183). This principle of the paramountcy of federal law has been applied to the allowance of claims in statutory liquidations by state officers. *United States* v. *Pink*, 315 U.S. 203.

find objection to the achievement of the same result by a somewhat different theory.

We do not perceive any legitimate interest of New York which would be impaired by giving effect to the license according to its terms. If there were any intervening third party interests which were or could be injured by the allowance of the present claim the situation might be very different. But we are aware of no such interests here. It is undisputed that the Superintendent has at all times since the filing of this action maintained a reserve for the payment of plaintiff's claim and that the maintenance of that reserve has not prejudiced payment of any other claim which has been or may be established or allowed. The Superintendent has informed us that all established and allowed claims have been paid in full and that sufficient reserves are maintained by him to pay in full all claims now in litigation. He has also informed us that sufficient reserves are held by him to pay any interest which may be awarded on any such claims.[13] Accordingly payment by the Superintendent to the plaintiff in accordance with the judgment of the

[13] By our petition for writ of certiorari in *McGrath, et al. v. Paramount, et al.*, No. 594, we are requesting this Court to hold in a similar liquidation in California that, in general, interest is not payable where the delay in payment of principal was the result of federal prohibitions. If this Court should sustain that position, it is probable that no interest would be payable in the present liquidation.

court below will not impair any vested rights of any creditors."[14]

The Superintendent has suggested, however, that the rights of the United States under its vesting order should be regarded as third party intervening rights and that those rights cannot be waived by the issuance of a retroactive license. We think it clear that no question is here presented of a waiver of proprietary rights of the United States under its vesting order. That order (Ex. E, R. 201) merely vested "the excess proceeds" of the Agency "remaining after the payment of the claims of the creditors, accepted or established in accordance with the Banking Law of the State of New York." It did not attempt to determine what claims should be so accepted or established. The order cannot possibly be read as ousting the Custodian of his authority under Section 5(b) of the Trading With the Enemy Act to license and thereby validate transactions with the Agency so as to remove any federal impediment to the recognition of claims based on such transactions. In the *Fuel Refining* case,

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[14] The Superintendent has suggested that there may be other contingent creditors whose claims if allowed would more than exhaust the remaining surplus in his hands. But we perceive no reason why a holding that retroactive effect can be given to the Custodian's license so as to establish the present claim as one which had accrued on the date when the Superintendent took over should open up the liquidation to claims which were contingent as a matter of state law. Nor do we perceive anything in the opinions of the New York courts which suggests that such contingent creditors have any rights which could be deemed impaired by allowance of the present claim.

supra, the Acting Director held that the power to validate past transactions could be so exercised as to afford the basis for a claim against the United States under Section 32 of the Act. He stated that nothing in the circumstance that the property had been vested or in the provisions of Section 32 operated to remove vested property from the scope of the general power under Section 5(b) of the Act to validate a hitherto unlicensed transaction. We believe that decision was clearly correct and that the principles underlying it are applicable *a fortiori* to the validation of a transaction which forms the basis for a claim against the Superintendent.

CONCLUSION

Accordingly we believe there is no real conflict with New York law or policy and that this Court would be entirely warranted in making final disposition of the case itself. That course would avoid the delays and expense of further litigation and would afford full protection to the Superintendent. Such a disposition by this Court could be made either by dismissing the writs of certiorari as moot or by affirmance on the grounds herein stated. We suggest, however, that since the position which the Superintendent has taken appears to cast doubt on the authority of the Custodian to validate transactions *ab initio*, it would be desirable that those doubts be expressly resolved by this Court.

Respectfully submitted,

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Solicitor General.
HAROLD I. BAYNTON,
Acting Director,
Office of Alien Property.
JAMES L. MORRISSON,
Attorney.

APRIL, 1950.

APPENDIX

UNITED STATES OF AMERICA, DEPARTMENT OF JUSTICE

Office of Alien Property
Washington, D. C.

Decision of Harold I. Baynton
Deputy Director
Office of Alien Property

Title Claim Nos. 904-A-199

Docket No. 59

In the Matter of: FUEL REFINING CORPORATION

This matter comes before me on a petition of the Chief of the Claims Branch for review of the Decision of Michael F. Kresky and Nugent Dodds, Hearing Examiners, and memorandum for claimant in opposition thereto.

STATEMENT OF THE CASE

This proceeding arose out of the vesting in 1942 and in 1943 of certain United States patents as the property of nationals of Germany, Denmark, and the Netherlands (D. 1-2).* Fuel Refining Corporation (hereinafter referred to as "Fuel Refining") claimed that it was the owner of twelve of the patents involved immediately prior to their vesting upon the basis of an assignment of the patents to it from Otto-Winputte Ovenbow, Mij., N.V., a corporation of the Netherlands, dated July 2, 1940. (D. 3). In opposition to the claim it was contended in

* References to the decision of the examiners are designated "D".

this respect that the assignment did not pass title to Fuel Refining because it was an unlicensed transaction prohibited by Executive Order No. 8389, effective as to nationals of the Netherlands May 10, 1940, (D. 4).

In respect of the licensing feature of the case, which is the only matter here challenged, the examiners found that the assignment was a transaction which required a license from the Secretary of the Treasury and that one has not been obtained (D. 11), that the assignment was ineffective to pass title unless subsequently licensed or otherwise authorized by the Secretary, and that the licensing power of the Secretary as to patent transactions has since November 17, 1942, rested in the Alien Property Custodian and is now in the Attorney General as his successor, to be exercised through the Director of this Office (D. 12-13). Accordingly, the remaining question was, according to the examiners, whether the Director's discretion should be employed to validate the assignment (D. 13). The examiners answered this question in the affirmative and hence determined that the claim of Fuel Refining should be allowed (D. 13-23).

The Chief of the Claims Branch in his petition for review has requested a determination of two principal questions:

(1) Whether in a title claim proceeding in which the claim of ownership of the vested property rests upon an unlicensed transfer that took place prior to vesting, the Director is empowered to validate the transfer as of the date it occurred;

(2) Whether, assuming the Director has such

power, he has delegated its exercise to a hearing examiner designated to determine the claim.

Opinion

I

Under the Trading with the Enemy Act, as amended, the Executive Orders, and rules and regulations issued thereunder, a transaction which for its effectiveness requires a license creates no enforceable rights in the absence of a license. In the exercise of its powers under the Trading with the Enemy Act, as amended, however, it has been the consistent administrative practice of the Treasury Department in operating Foreign Funds Control to license transactions retroactively. See General Ruling No. 12, which specifically provides for a license "before, during, or after" a transfer. Such a license "completely validates the transfer" for the purposes of freezing control.* Similarly, although the normal practice in the Office of Alien Property has been to grant licenses upon request prior to consummation of the transaction, in exceptional cases authorizations or licenses have been issued to validate past transaction.

It is clear that the Congress intended to confer upon the President, operating through such agencies as he might choose, flexible powers to deal with the problems surrounding alien property in the manner deemed most effective in each partic-

* The Treasury Department is not concerned with the instant matter, see General Ruling No. 19, August 2, 1946; Public Circular No. 31, August 2, 1946, but its practice is evidence of the consistent administrative interpretation of the powers conferred by the Trading with the Enemy Act, as amended, and Executive Order No. 8389.

ular case. H. Rept. 1507, 77th Congress, 1st session, accompanying H. R. 6233 which was enacted as the December 1941, amendment to section 5(b) of the Trading with the Enemy Act. That amendment provided in part that

> "* * * the President may, through any agency that he may designate, or otherwise, and under such rules and regulations as he may prescribe, by means of instructions, licenses, or otherwise * * *, regulate * * * transactions involving any property in which any foreign country or a national thereof has any interest, by any person, or with respect to any property, subject to the jurisdiction of the United States * * *"

Executive Orders No. 9193 and 9788 conferred upon this Office similar flexibility in their delegation of "all powers and authority" conferred upon the President by section 5(b) of the Trading with the Enemy Act, as amended. The power to grant licenses retroactively is a reasonable exercise of those powers and is necessary for carrying out the purposes of the Trading with the Enemy Act. No question has been raised in this proceeding as to the existence of this power.

The narrow question here presented is whether this Office has the power to grant a retroactive license in those cases where the property which was attempted to be transferred by an unlicensed transaction has been vested in the Attorney General subsequent to the time of the unlicensed transaction. The issue is whether this additional factor takes the matter out of the field within which the licensing power may be exercised.

As pointed out in the brief of the Claims Branch, the granting of a retroactive license would serve to establish claimant as the "owner" of the patents immediately prior to vesting and so make it eligible for a return under section 32 of the Trading with the Enemy Act, provided that the other conditions of that section were met.* It does not follow, however, that the fact that this would be the result of the exercise of the power to license retroactively argues against the existence of the power. Government property may, of course, be disposed of only under authority of law, "either by an express Act of Congress for that purpose, or by giving the authority to some Department of the Government, or subordinate agent." *U. S. v. Nicoll*, 27 Fed. Cas. 15879, quoted in 34 Op. A.G. 320, 322 (1924), but the Trading with the Enemy Act, as amended, read as a whole, confers the authority to make a return in this case. Under section 32 of the Trading with the Enemy Act property may be returned to "the owner * * * immediately prior to its vesting," provided he is otherwise eligible. Under section 5(b) a license may be granted so as to relieve the transferee in an unlicensed transaction of the disabilities imposed by the Trading with the Enemy Act and the regulations issued thereunder. The effect of this latter action may well be to make such a transferee an "owner" who could not other-

*The comments of the examiners on the phrase "owner immediately prior to vesting" (D. 17-18) would unduly restrict the effect of its language as imposing a condition upon eligibility for return. It is clear that a claimant whose rights depend upon an unlicensed transfer cannot be an "owner" within the meaning of section 32 so long as the transfer remains unlicensed.

wise be recognized as such, but this result appears clearly within the statutory authority.

I am persuaded that it was not intended by the use of the term "owner * * * immediately prior to vesting" to withdraw a particular group of transactions from the licensing power, those where the property was subsequently vested. The legislative history of section 32 does not specifically deal with this question, but there are frequent indications of a purpose to place the person to whom return is made in the same position as though no vesting had occurred, both with respect to his rights and his obligations. See letter from James E. Markham to Chairman Summers, September 27, 1945; H. Rept. No. 1289, November 20, 1945, pp. 9-11, 79th Cong. 1st sess. It would be an unnecessarily narrow construction of the flexible powers granted under section 5(b) and run counter to the remedial purpose of section 32 to hold that the latter section imposed a new limitation upon the licensing power.

It may be suggested that to declare that a license may be retroactive to the date of the unlicensed transaction might result in an application of the fiction of relation back to the injury of third parties. I do not in this present decision consider whether the power can be exercised when injury to third parties might result, although there is authority that statutes may permit such retroactivity. *United States* v. *Stowell*, 133 U. S. 1, 16 (1889); *United States* v. *1960 Bags of Coffee*, 8 Cranch 398 (1814). In the instant matter only the interests of the claimant and the government are involved. Statutes conferring benefits upon claimants have

been applied to permit the benefit to be received through the application of the fiction of relation back against the asserted interests of the government. *United States* v. *Anderson*, 194 U. S. 394 (1904); *The Manila Prize Cases*, 188 U. S. 254 (1903); see also *The Sally*, 8 Cranch 382, 386 (1814). A different question arises where the government as a third party is injured by the application of the fiction of relation back. *Stoddart* v. *United States*, 4 Ct. Cls. 511 (1868); *Mayer* v. *Garran*, 270 Fed. 229 (D. Mass., 1920). But see *Mayer* v. *Garran*, 278 Fed. 27, 33 (C.C.A. 1st, 1922); *Stochr* v. *Miller*, 296 Fed. 414, 425 (C.C.A. 2d, 1923). The instant matter, however, does not involve rights of third parties, whether private persons or government. I am of the view that in such a case where it is considered desirable as a matter of administrative policy to grant a retroactive license to a claimant, the power to do so has been conferred upon this Office.

II

The second question presented on this petition for review is whether the power of this Office to grant licenses has been delegated to the Hearing Examiners. General Order No. 31, as amended, has designated certain officials of this Office as authorized to exercise the power to grant licenses. The Hearing Examiners are not there included. The examiners, however, assert that authority for them to exercise the power is to be found in section 504.21 of the Rules of Procedure for Claims, in its reference to "findings * * * upon all the material issues of fact, law, or discretion presented on the record."

The licensing of prohibited transactions was not, however, intended to be conferred upon the examiners by that section. Licensing involves questions of discretion and policy which may or may not properly be the subject of adversary proceedings. The examiners, however, are limited to consideration of the record in the particular case and can make findings only on issues presented on that record. To determine that a license should be granted would frequently require consideration of factors or evidence outside of the record.

ACCORDINGLY, the decision is reversed and the claim remanded for a recommendation as to licensing by the appropriate officials of this Office.

(s.) HAROLD I. BAYNTON,
Deputy Director.

AUGUST 10, 1948.

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